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IN THE

Supreme Court of the United States

BEVERLY R. GILL, ET AL.,

Appellants,

v.

WILLIAM WHITFORD, ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WISCONSIN

BRIEF FOR BIPARTISAN GROUP OF CURRENT AND FORMER MEMBERS OF CONGRESS AS AMICI CURIAE IN SUPPORT OF APPELLEES

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BRIEF FOR BIPARTISAN GROUP OF CURRENT AND FORMER MEMBERS OF CONGRESS AS AMICI CURIAE IN SUPPORT OF APPELLEES

INTEREST OF AMICI CURIAE[1]

Amici curiae are current and former Members of the House of Representatives from both major political parties—16 Republicans and 18 Democrats. Amici hail from 23 different States, representing every corner of our Nation, from south Florida to Maine's northern border and from southern California's Pacific coast to the northwest tip of Washington. Despite many politi-

[1] No counsel for a party authored this brief in whole or part, and no counsel or party made a monetary contribution to fund the preparation or submission of this brief. No person other than the amici curiae and their counsel made any monetary contribution to its preparation and submission. All parties have consented to this filing.

cal and regional differences, amici are united in the belief that, in our system of government, power flows from the People to their political representatives and not the other way around. Amici are moreover united in the belief that removing the most extreme forms of partisan manipulation from the legislative redistricting process is consistent with principled and constituent-first representation.

Amici are in a unique position to understand the nature of the redistricting process, and are uniquely affected by it. Amici have seen the redistricting process up close, know what it means to represent the people of a community in what Madison called the "popular branch" of government, and know how districting decisions can affect the incentives and pressures a Member experiences.

Amici hope that describing their first-hand experiences with the harms caused by hyper-partisan gerrymandering will help the Court understand why basic, enforceable constitutional limits on extreme gerrymanders will make Congress work better for the People.

Amici are the following Members and former Members of the U.S. House of Representatives, in alphabetical order:

1. Rep. Mark Amodei (R-Nev.)
2. Rep. Don Beyer (D-Va.)
3. Rep. Rod Blum (R-Iowa)
4. Rep. Earl Blumenauer (D-Ore.)
5. Rep. Brendan Boyle (D-Penn.)
6. Fmr. Rep. Mike Castle (R-Del.)
7. Fmr. Rep. Rod Chandler (R-Wash.)

8. Fmr. Rep. William Clinger (R-Penn.)
9. Rep. Mike Coffman (R-Colo.)
10. Rep. Jim Cooper (D-Tenn.)
11. Rep. Carlos Curbelo (R-Fla.)
12. Rep. Ted Deutch (D-Fla.)
13. Rep. Brian Fitzpatrick (R-Penn.)
14. Rep. Josh Gottheimer (D-N.J.)
15. Rep. Raúl M. Grijalva (D. Az.)
16. Rep. Andy Harris (R-Md.)
17. Fmr. Rep. David Jolly (R-Fla.)
18. Rep. Marcy Kaptur (D-Ohio)
19. Rep. Dan Kildee (D-Mich.)
20. Rep. Derek Kilmer (D-Wash.)
21. Rep. John Larson (D-Conn.)
22. Rep. Alan Lowenthal (D-Cal.)
23. Rep. Beto O'Rourke (D-Tex.)
24. Rep. Seth Moulton (D-Mass.)
25. Rep. Chellie Pingree (D-Maine)
26. Rep. David Price (D-N.C.)
27. Rep. Jamie Raskin (D-Md.)
28. Rep. Tom Reed (R-N.Y.)
29. Fmr. Rep. Claudine Schneider (R-R.I.)
30. Fmr. Rep. Christopher Shays (R-Conn.)
31. Fmr. Rep. Olympia Snowe (R-Maine)
32. Rep. Thomas Suozzi (D-N.Y.)

33. Rep. Scott Tipton (R-Colo.)

34. Fmr. Rep. Zach Wamp (R-Tenn.)

INTRODUCTION AND SUMMARY OF ARGUMENT

Thirty years ago, President Ronald Reagan addressed the annual gathering of the Republican Governors Association to decry the use of partisan gerrymandering. President Reagan explained that what the country needed was "an end to the antidemocratic and un-American practice of gerrymandering congressional districts."[2] Yet, three decades later, amici and their constituents continue to experience the corrosive effects of partisan gerrymandering. Since President Reagan's call to action, both major political parties have used partisan gerrymandering with ever greater frequency and efficiency, to the detriment of voters of all stripes. Amici therefore believe that the need for some constitutional boundaries is greater than ever.

This brief makes two overarching points.

First, extreme partisan gerrymandering harms our political system, and harms the functioning of the House in particular. It puts raw partisan position ahead of maintaining coherent political communities and sensibly sized and shaped districts based on traditional districting criteria. A cascade of negative results predictably follows: artificially drawn "safe" districts make the general election uncompetitive and give party insiders and a small core of "base" primary voters wield greater influence than the general electorate; political parties gain influence and obstruct independent, con-

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[2] Reagan, Remarks at the Republican Governors Club Annual Dinner (Oct. 15, 1987) *available at* http://www.presidency.ucsb.edu/ws/?pid=33559.

stituent-first representation; compromise with the other side becomes politically impossible even when there are areas of principled agreement and even when the voters want it; and the People grow frustrated with the capacity of the House to govern effectively, causing disillusionment with and disengagement from our democratic process.

Second, extreme partisan gerrymandering is undemocratic, and cannot be reconciled with the Framers' idea of a House of Representatives that would be directly accountable to the People through competitive and broad-based elections. In the Framers' view, the House was to be the institution most directly connected to and representative of the People. Yet the premise of extreme partisan gerrymandering is that politicians choose their voters, and not the other way around. The Framers' vision precludes such bald manipulation of the electoral process.

Partisan gerrymandering makes it more difficult for Members to do the one job voters expect above all: delivering results for their constituents. Amici see this happening, and see the role partisan gerrymandering plays in this dynamic. We can and must do better.

ARGUMENT

I. EXTREME PARTISAN GERRYMANDERING UNDERMINES THE HEALTHY FUNCTIONING OF THE HOUSE

Extreme partisan gerrymandering is a practical problem for our political system, and for the health of the House of Representatives in particular. In our form of government, partisanship cannot be an end unto itself, as it is with partisan gerrymandering. Members must be free above all else to follow the desires of their constituents. But partisan gerrymandering, in the variety of

ways discussed below, creates obstacles to that pursuit. As amicus former Representative Zach Wamp, Republican of Tennessee, explained: "Too many Congressional districts have been carefully designed to guarantee victory for one political party or another ... As the political lines become more skewed, successful candidates are increasingly more interested in political rhetoric than solutions and serving the public."[3]

A. Extreme Partisan Gerrymandering Subverts Traditional Districting Criteria, Which Harms Both Members And Constituents

Extreme partisan gerrymandering subverts traditional districting principles that preserve coherent local identities and political communities. By definition, the dominant consideration in an extreme partisan gerrymander is systematic benefit to the party drawing the lines, not the needs of existing communities.

Traditional districting principles, such as compactness, regularity, and maintenance of communities of interest, have long played a critical role in creating coherent political communities with shared identities, concerns, and interests. *See, e.g.*, *Evenwel* v. *Abbott*, 136 S. Ct. 1120, 1124 (2016).

These principles help ensure that districts have coherent geographic and political identities, and thus help maintain a deep connection between a Member and his or her constituents. As amicus Representative Scott Tipton, Republican of Colorado, has explained, it is incredibly important for a district to have coherent identity. Discussing his district, Rep. Tipton said that "we

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[3] Hill Staff, *Wamp backs Dem redistricting plan*, The Hill (June 23, 2005).

are rural Colorado"—and that rural issues, like water issues, bind his district together, giving it a common language and a core "essence."[4] Rep. Tipton credits the strong community and coherent identity of his district as a feature that encourages political competition, and wards off needless partisanship: In Colorado's Third Congressional District, "we've elected Republicans, we've elected Democrats," he explained; "irrespective of ... heritage," "irrespective of geography," "irrespective of party[:] we elect the person."[5]

Traditional districting criteria aid effective representation in other ways as well. As amicus Representative Mike Coffman, also Republican of Colorado, has noted, drawing districts that respect existing political boundaries means that Members can work more effectively with local officials in serving their constituents.[6] In Colorado, that means working with county governments, which administer major federal programs such as Medicaid and food stamps—as amicus Rep. Coffman explained after line-drawers attempted major changes to his district.[7]

Without constitutional limits on partisan gerrymandering, traditional districting principles can be subverted at will whenever a single political party gains control of the redistricting process and seeks to maximize its political advantage no matter the cost. *See, e.g., League of United Latin Am. Citizens* v. *Perry*,

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[4] Tr. of Testimony of Rep. Scott Tipton ("Tipton Tr.") 1321, *Moreno* v. *Gessler*, No. 11 Civ. 3461 (D. Colo. Oct. 17, 2011).

[5] *Id.* at 1334, 1338.

[6] Tr. of Testimony of Rep. Michael Coffman 2573-2574, *Moreno* v. *Gessler*, No. 11 Civ. 3461 (D. Colo. Oct. 21, 2011).

[7] *Id.* at 2572.

548 U.S. 399, 481 (2006) (Stevens, J., concurring in part and dissenting in part). A map that is drawn solely to achieve partisan ends undermines the benefits that tend to come from traditional, compact districts that respect existing geographic and political boundaries.

Consider, for example, Representative John Shimkus, Republican of Illinois. The 2011 redistricting process dramatically changed his district. Rep. Shimkus's hometown of Collinsville, with a population of just 25,000, was divided among three congressional districts.[8] And the geographic size of the district was massively expanded to include all or part of *33 counties*. This geography makes it much more difficult for Rep. Shimkus to consistently interact with constituents across the district—nearly impossible, for example, to hold town halls in every community across the district in the same way that he could in a district that was drawn using traditional principles.[9]

Or consider amicus Representative Andy Harris, Republican of Maryland. Rep. Harris's district had long been centered in Maryland's Eastern Shore, a coherent geographic, economic, and cultural region that is rural and focused around the Chesapeake Bay. In 2010, as part of a map that has since been challenged as an extreme partisan gerrymander, 135,000 people from areas on the Bay outside of Annapolis and Baltimore

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[8] Pearson, *House Members Blast Illinois' New District Map in Court*, Chi. Trib. (Nov. 18, 2011).

[9] *See also* Steinhauer, *Hello, Illinois? Your Congressman Is Getting Off the Phone*, N.Y. Times (Apr. 24, 2012) (former Rep. Tim Johnson (R-IL) lamenting that Illinois' "grossly gerrymandered congressional map" would have forced him into a district in which "two-thirds of the voters have never been represented by" him).

were pulled out of the district, and replaced by about 115,000 people in north central Maryland, a landlocked area on the other side of Baltimore along the Pennsylvania border. This change may have served partisan ends—*i.e.*, packing a higher percentage of "Republican" voters into Rep. Harris's district—but it also diluted the coherent, Eastern-Shore-based identity of Rep. Harris's district.[10]

Districting changes like those affecting Rep. Shimkus and amicus Rep. Harris and the communities they serve are not fair to anyone—and especially not to the voters.[11] As Representative Rodney Davis (R-IL) has explained, extreme partisan gerrymanders make it unnecessarily difficult to "form districts that better reflect the interests of [the] citizens."[12]

Traditional districting considerations—such as compactness, contiguity, respect for natural boundaries and preexisting county and municipal lines, and the

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[10] Johnson, *Is This How Maryland's 3rd Congressional District is Supposed to Look?*, Wash. Post (Sept. 21, 2014).

[11] Partisan gerrymanders also frequently lead to incumbents running in what are effectively new districts drawn with no particular goal beyond partisan ends. Sometimes that means that two incumbents' districts have been smashed together, eliminating established political communities and forcing experienced Representatives to run against one another. *See* Iyer, *Redistricting and Congressional Control Following the 2012 Election*, Brennan Center for Justice (Nov. 28, 2012) (finding that, in 2012, 40 incumbents, evenly split by party, left office at least in part due to districting changes).

[12] Press Release, Rep. Alan Lowenthal, *Congressman Lowenthal Leads Bipartisan Amicus Brief to Supreme Court Defending Voters' and States' Rights* (Jan. 26, 2015), https://lowenthal.house.gov/news/documentsingle.aspx?DocumentID=398562.

maintenance of communities of common interest—are meant to reinforce the traditional role of representatives as leaders in and members of a coherent political and geographic community. That is how representation works best in our democracy: As Madison wrote, a Representative should possess "a local knowledge of their respective districts" and remain "acquainted with the interests and circumstances of his constituents." Federalist No. 56. Amicus Rep. Tipton echoed that idea in discussing how he got into politics: He was taught that there is a "public responsibility to participate," which means citizens going to "precinct caucuses and county assemblies, because that's how the process works. You had an opportunity to be able to see who was going to cast your vote in the state legislature and Congress and the city council."[13] Traditional districting principles are able to reflect that sense of participation and community identity. Extreme partisan gerrymanders sacrifice those values in favor of whatever map will most benefit the particular party in power.

B. Extreme Partisan Gerrymandering Devalues Pragmatic Problem-Solving And Constituent-First Representation In The House

Extreme partisan gerrymandering also rewires a district's internal political dynamics—between Members and their respective political parties, and between Members and their constituents. Partisan gerrymanders move affected Members towards their respective ideological poles, encourage Members to eschew principled, bipartisan compromise, and transfer power from voters to political parties. Importantly, these gerrymanders prevent Members from following the cardinal rule of

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[13] Tipton Tr. 1315.

serving as a representative of the People, which Representative Mark Meadows, Republican of North Carolina has succinctly set forth: "My allegiance is *always* to my constituents and *never* to a party."[14] That is why, as Representative Steve Pearce (R-NM) has explained, addressing gerrymandered districts is "the most important thing that we should do as a nation[.]"[15]

1. Hyper-partisan gerrymandering leads to the creation of uncompetitive districts that incentivize Members to prize partisan considerations above all.

One of the fundamental problems with extreme gerrymandering is that it can create or entrench artificially "safe" districts that, by definition, rarely feature competitive general elections. This can be done through "packing" the disfavored party's supporters into a small minority of districts, and thus "cracking" that party's remaining support in the many remaining districts. Regardless of the statewide total, or the particulars of the election, the line-drawing party will be "safe" in the majority of that state's districts. In part because of the sharp rise in such extreme partisan gerrymandering, amicus Representative Rod Blum, Republican of Iowa, explained that out of the 435 House districts, "you probably have 25-35 congressional districts that are actually competitive."[16] Amica former Senator and Representative Olympia Snowe, Republi-

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[14] Israel, *A Matter of Principles: Mark Meadows Speaks Conservatism*, Mida (July 2, 2017).

[15] Rubel, *Pearce, Brazile Agree on Top Political Problem*, Las Cruces Sun-News (June 25, 2017).

[16] Burke, *Rep. Rod Blum: I'll Walk the Walk on Term Limits*, Newsmax (May 29, 2015).

can of Maine, was even more pessimistic, suggesting in October 2014 that "as few as seven seats are considered to be tossups in this election" due largely to gerrymandering.[17]

The general election result in "safe" districts is rarely in doubt. Representative Mike Gallagher (R-WI) has explained that politicians should not be "allowed to gerrymander their districts and choose their own voters" precisely because "[t]he less competitive a district becomes, the more general elections become formalities."[18] When the general election is a mere formality, then the emphasis naturally shifts to the primary of the party for which the district is "safe"—whoever wins that primary will almost always win the general election. In these circumstances, power shifts from the general electorate to party insiders with influence over the nomination process and to low-turnout primary elections that principally attract a small subset of "base" voters whose views tend to be to the ideological right and left of most other voters.[19] As a result, amicus Representative Earl Blumenauer (D-OR) explained in an op-ed with then-Representative Jim Leach (R-IA), "[p]rimary elections in districts that are overwhelmingly Republican produce candidates generally to the right of the average Republican, while more

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[17] Fleury & Wright, *A Chat With Olympia Snowe*, Downeast (Oct. 2014).

[18] Gallagher & Khanna, *Two congressmen offer a bipartisan plan to 'drain the swamp'*, Journal Sentinel (June 1, 2017).

[19] *See* Tarr & Williams, *Introduction*, 37 Rutgers L.J. 877, 878 (2006) ("Rather, legislators and legislative candidates are driven to appeal to the most ideological members of their own parties, because those partisans turn out disproportionately in party primaries, the only important races in a gerrymandered system.").

liberal Democrats usually emerge from primaries in districts that are overwhelmingly Democratic."[20]

The elevation of the primary over the general election has meaningful consequences for Members. As Representatives Darin LaHood (R-IL) and Dan Lapinski (D-IL), jointly described last year when introducing their Congress of Tomorrow Project, a bipartisan endeavor focused in part on minimizing partisanship in redistricting, "as a result of years of gerrymandering congressional districts, some of our elected public servants are winning their offices by a minority of a minority of a minority."[21] A Member in a "safe" district has strong incentives to appeal to the party insiders and/or highly-partisan primary voters who hold the key to reelection.[22] This dynamic, amicus Representative David Price (D-NC) noted, "really affects the way members behave once they come [to Congress]. I've heard some guys say they might be more moderate, but they just can't be .... It all adds up to pretty extreme

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[20] Blumenauer & Leach, *Redistricting, a Bipartisan Sport*, N.Y. Times (July 8, 2003).

[21] *Congress of Tomorrow Project Introduction*, Congressional Institute, http://conginst.org/congress-of-tomorrow-project-introduction/ (last visited Sept. 5, 2017).

[22] *See, e.g.*, Raviv, *Unsafe Harbors: One Person, One Vote and Partisan Redistricting*, 7 U. Pa. J. Const. L. 1001, 1068 (2005) ("[P]oliticians who are elected to office only have to cater to voters from one party, and such politicians—either out of conviction or out of political prudence—tend to fall further from the ideological center than do politicians who have to reach out to voters from both parties to get elected.").

behavior. The gerrymandering really exacerbated that."[23]

In other words, when the desires of the most ideologically extreme "minority of a minority of a minority" diverge from the desires of the broader electorate, the former will receive outsized consideration in a gerrymandered "safe" seat. The result is a dynamic that amici see all too often: intense pressure to be driven by partisanship over all other considerations, leaving more moderate voters from the party that drew the district lines, independent voters, *and* voters from the disfavored party (including those who could have been cross-over voters) all feeling voiceless and unrepresented in the House.[24] Amicus Representative Jim Cooper (D-TN) laid bare the broad scope of the problem: gerrymandering "is not only unfair to independent voters, but *all voters*, because it creates a Congress

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[23] Grossman, *Fixing Gerrymandering Doesn't Just Make Elections More Fair*, Slate (Mar. 20, 2017).

[24] This Court has recognized this dynamic. *Cf. Shaw* v. *Reno*, 509 U.S. 630, 648 (1998) ("When a district obviously is created solely to effectuate the perceived common interests of one [] group, elected officials are more likely to believe that their primary obligation is to represent only the members of that group, rather than their constituency as a whole. This is altogether antithetical to our system of representative democracy."). So have prominent legal scholars. *See* Levinson & Pildes, *Separation of Parties, Not Powers*, 119 Harv. L. Rev. 2311, 2335 (2006) ("The absence of a general election threat enables party activists, who turn out in disproportionate numbers in primary elections and whose views typically reflect the extremes of the party's support, to select more partisan primary winners."); *see also* Tarr & Williams, *Introduction*, 37 Rutgers L.J. at 878 ("Partisan gerrymandering encourages extreme partisanship and extreme positions.").

of highly-partisan representatives when most Americans are centrists."[25]

This all stands in contrast to the types of truly competitive districts that are choked out of existence by extreme gerrymanders. A competitive district, as Representative David Joyce (R-OH) has explained, "forces you to evaluate each piece of legislation and not just answer to the fringes of the parties."[26] Winning in a competitive district demands that Members actively engage with, and craft policy positions designed to help, a broad cross-section of their constituents.[27] Rep. Pearce, also a Republican, noted that his competitive New Mexico district forces him to "talk to a lot of Democrats" and to "go into areas that have never seen a Republican."[28] In these more competitive districts, Members actively work to represent their whole constituency, and citizens reciprocate with more robust civic engagement.

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[25] Press Release, Rep. Jim Cooper, *Cooper, Tanner Work to Stop Gerrymandering* (Apr. 21, 2010) https://cooper.house.gov/media-center/press-releases/cooper-tanner-work-to-stop-gerrymandering (emphasis added).

[26] Akron Beacon Journal Staff, *Ohio's 14th Congressional District race: Andrew Jarvi, Dave Joyce, Michael Wager*, Akron Beacon Journal (Oct. 19, 2016).

[27] *See* Adams, *Toward a System of "Fair and Effective Representation": A Common Cause Report on State and Congressional Reapportionment* 24 (1977) ("Safe districts remove the incentive to grant political concessions to constituent interests ... or create electoral coalitions [that] ensure representation of diverse points of view."); Raviv, *Unsafe Harbors*, 7 U. Pa. J. Const. L. at 1068 (arguing that safe districts encourage polarization in decisionmaking bodies).

[28] Hayden, *Pearce talks endangered species, Trump*, Carlsbad Current-Argus (Aug. 18, 2016).

Members from these districts also drive the creation of and membership in House caucuses that incubate pragmatic ideas in order to minimize partisanship and deliver results for constituents. For example, amici Republican Representative Tom Reed of New York and Democratic Representative Josh Gottheimer of New Jersey co-chair the Problem Solvers Caucus, which, as its name suggests, is designed to overcome party polarization and deliver practical solutions for the American people.[29] Likewise, amici Republican Representative Carlos Curbelo and Democratic Representative Ted Deutch, both of Florida, co-chair the bipartisan Climate Solutions Caucus, which explores policy solutions designed to address the impacts of our changing climate.[30] Indeed, to best represent the constituents of his competitive district, amicus Rep. Blum has caucused with multiple, cross-cutting groups, such as the Freedom Caucus and the Problem Solvers Caucus. As Rep. Blum explained: "I think I've done an excellent job of standing up to Washington, D.C., in my own party when it needs to be stood up to, and then also compromising when it's for the good of Eastern Iowa."[31]

Representative Will Hurd (R-TX) perhaps best summed up the benefits of competitive districts in July 2017 when he said: "My district is competitive, and that's a good thing ... because it forces people to talk to

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[29] *See* Marcos, *Lawmakers set up bipartisan Problem Solvers Caucus for new Congress*, The Hill (Feb. 3, 2017).

[30] Press Release, Rep. Carlos Curbelo, *Curbelo, Deutch Welcome 50 Members to Bipartisan Climate Solutions Caucus* (July 25, 2017) https://curbelo.house.gov/news/documentsingle.aspx?DocumentID=1603.

[31] Crippes, *Rod Blum: Desire to reform Congress drives second term*, Quad-City Times (Oct. 22, 2016).

a broader sense of the community[.] ... If more districts were like mine, we'd have better caliber people in Washington."[32]

2. Partisan gerrymandering enhances the influence of political parties at the expense of independent-minded Members and the constituents they serve.

The opportunity to engage in unfettered partisan gerrymandering also alters the dynamics between Members and their political parties. Power shifts to party insiders, who dictate the literal party line and demand that Members abide by it, irrespective of the preferences of a Member's constituents. If an independent-minded Member breaks with her party on issues where the party and her constituents are not aligned, party insiders can use the next redistricting process to make reelection difficult for that Member, or eliminate her seat altogether. This power dynamic distorts the proper functioning of the House and makes it less responsive to the People.

Members have already responded to efforts by political parties to come between them and their constituents. Rep. Meadows, Representative Raul Labrador (R-ID), and other Members started the Freedom Caucus as just such a response. In the wake of the 2014 election, Republican Members were receiving orders from their party on the substantive positions they needed to take on important issues, even though some of the positions being pressed upon them were not consistent with their constituents' preferences. As Rep. Meadows explained then, "I didn't run for Congress to

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[32] Stewart, *Hurd Defends District Lines in Court*, Roll Call (July 17, 2017).

be a yes vote for House Republican leadership. ... I came to Congress to make the voices of the people of Western North Carolina heard."[33] For his part, Rep. Labrador recounted that he helped found the Freedom Caucus in order to preserve his independence from party insiders so that he and other Members could always put their constituents first: "We said 'enough is enough. Let's start a group that actually listens to the people back home, that actually has a good feeling for what the people back home want to do.'"[34]

In amici's experience, if partisan gerrymandering remains unchecked, party insiders will use the redistricting process to threaten or punish independent-minded Members. For example, Representative Jim Jordan (R-OH) was threatened with the erasure of his districts by party officials after he took independent stands to represent his constituents' interests above party interests when the two were in conflict.[35] And it went even further in the case of Representative Justin Amash (R-MI), where the party actually redrew his district in an unsuccessful attempt to defeat his reelection.[36] Using the redistricting process to enforce inter-

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[33] Neal, *Meadows loses subcommittee chair after bucking leaders*, Des Moines Register (June 21, 2015).

[34] Frontline, *Divided States of America (Part I)* PBS (aired Jan. 18, 2017), http://www.pbs.org/wgbh/frontline/film/divided-states-of-america/transcript/.

[35] Joseph, *Jordan in redistricting crosshairs after bucking Boehner*, The Hill (July 28, 2011).

[36] Harger, *Is the GOP throwing Justin Amash under the bus?*, Michigan Live (June 24, 2011); *see also* Amash, Twitter (May 25, 2017) ("Gerrymandered by Republicans and the Michigan Chamber of Commerce to prevent my re-election. It didn't work.").

nal party discipline is anathema to Members' faithful and independent representation of voters' interests. Rep. Meadows emphasized this point only recently: "There should never be a punishment for voting the will of the people. ... To do otherwise would be to be putting party over people, and most Americans have a strong distaste for that."[37]

3. Partisan gerrymandering impedes Members' ability to deliver results for their constituents.

The increases in party influence and the number of Members affected by "safe" district dynamics caused by hyper-partisan gerrymandering have led to an unprecedented rise in partisanship in the House. As amica former Senator Snowe has explained, "[g]errymandered congressional districts produce predictably partisan representatives from each party" who are "further to the right and left than average citizens."[38] The result, unfortunately, is that partisan grandstanding and unprincipled obstruction reign supreme while independent-minded, results-oriented representation suffers.

1. The ability to find pragmatic, bipartisan solutions on policy questions big and small has suffered.[39]

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[37] Israel, *A Matter of Principles*, *supra*; *see also* Babington. *House GOP demotes lawmaker who defied leaders on trade vote*, Deseret News (AP) (June 22, 2015) (Rep. Meadows stating "No one should be punished for voting their conscience and representing their constituents[.]").

[38] Snowe & Glickman, *CPR for politics: Why we're forming the Commission on Political Reform*, USA Today (Feb. 19, 2013).

[39] *See generally* Mann & Ornstein, *It's Even Worse Than It Looks* (2012) (discussing the rise of hyper-partisanship and "ve-

Amici know that there are areas where Members from all sides share common ground notwithstanding their deeply held beliefs. And where the principled beliefs of Members from different parties overlap, the House works best when those Members work together to tackle an issue. Today, that is not what happens. Instead, even on issues where bipartisan agreement exists, the "play-to-the-base" and "play-to-the-party-insiders" dynamics that partisan gerrymandering encourages cause Members to leave common-sense policy solutions on the table. For some, that happens because in the current environment they may deem it more advantageous to attack the other side on a partisan cable news network rather than sit down, grapple with real differences, and explore the areas of genuine common ground that really do exist.[40] For others, the political dynamics in their district are such that working in a bipartisan way—any bipartisan way—will hurt their chances for reelection, *i.e.*, for winning their party primary.

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hemently adversarial" politics); Berman, *Managing Gerrymandering*, 83 Tex. L. Rev. 781 (2005) (discussing effects of "excessive partisanship"); Issacharoff & Karlan, *Where to Draw the Line?: Judicial Review of Political Gerrymanders*, 153 U. Pa. L. Rev. 541, 574 (2004) ("The result is not only less electoral accountability but also more fractiousness in government and more difficulty in forming legislative coalitions across party lines.").

[40] *See* Polsby & Popper, *The Third Criterion: Compactness as a Procedural Safeguard Against Partisan Gerrymandering*, 9 Yale L. & Pol'y Rev. 301, 306-307 (1991) ("[T]he beneficiaries of gerrymanders ... are also less needful of being near the political center of their districts. They are, in brief, more likely to be ideologues"); Cox, *Partisan Gerrymandering and Disaggregated Redistricting*, 2004 Sup. Ct. Rev. 409, 430 (2004) (arguing that "safe seats produce more polarized representatives because, by definition, the median voter in a district that is closely divided between the two major parties is more centrist than the median voter in a district dominated by one party").

Amici see these dynamics at play constantly. Amicus Rep. Blumenauer and former Rep. Leach explained that as a result of gerrymandering, "Members are less inclined to talk and cooperate, much less compromise," and "[t]he legislative agenda is shaped more to energize the political base than to advance the common good."[41] Even when they want to, Members are less able to strike compromises that are consistent with their independent judgment and their values (or unable to *resist* deals that don't reflect those values) because they are required to prioritize activists' desire for partisanship over the majority's desire for pragmatic solutions. Importantly, this is true regardless of a Member's particular district. For a Member who occupies an artificial "safe" seat, the dynamics described above apply with particular force. But even for Members who are not directly subject to such electoral disincentives, compromise is more difficult in an environment where there are no limits to the pursuit of partisanship in the shaping of electoral rules. Members who want to work from a position of principled independence have fewer potential partners on the other side. A critical mass of Members who are primarily focused on playing to a partisan base can thus undermine the legislative process for all.

Perhaps the saddest aspect of this dilemma is that, as amici know well, cooperation begets cooperation. Members who strike a difficult bargain on one issue develop trust that then allows them to work together in other areas—actively seeking areas of common ground where cooperation can lead to common-sense, mutually agreeable solutions to the problems our Nation faces. In earlier, less partisan eras, the result was a virtuous

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[41] Blumenauer & Leach, *Redistricting*, *supra*.

cycle of building trust. In today's partisan climate, a vicious cycle predominates, fostered in substantial part by extreme gerrymandering.

None of this is to suggest that Members should reflexively embrace bipartisanship for its own sake. Members of Congress can, will, and should hold principled beliefs that simply are not up for compromise. What matters is that Members are guided *only* by *their* judgment about how to deliver solutions for *their* constituents. When serving one's constituents calls for toeing the party line, a Member should do that; likewise, when serving one's constituents calls for working towards a bipartisan compromise, a Member should do that too. The principal problem with partisan gerrymandering is that it encourages *partisanship for its own sake*. That, amici strongly believe, is something no Member should embrace.

2. These negative effects for Members also hurt the House as an institution. The dramatic increase in partisanship has been accompanied by an equally dramatic decrease in the types of major bipartisan deals that leaders on both sides of the aisle were able to forge throughout much of the 20th Century. As amicus Representative Brian Fitzpatrick, Republican of Pennsylvania, explained, "[p]artisan gerrymandering has exacerbated electoral complacency ... and contributed to the growing divide of partisanship that grinds the gears of government to a halt."[42] The overall productivity of the House has declined as a result, diminishing the House's role in our government, which amici want to avoid.

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[42] Ripon Advance News Service, *Fitzpatrick leads bipartisan resolution calling on House to end political gerrymandering*, The Ripon Advance (May 11, 2017).

The dynamics that flow from hyper-partisan gerrymandering also contribute to the growing partisan rancor in the House. Too often, as Rep. Pearce observed, Members who represent gerrymandered districts "can say the most outlandish political stuff [they] want to say" without consequence.[43] Not only does this sort of "red meat" partisan rhetoric deter meaningful problem-solving, it also diminishes the standing of the House in the eyes of the People.

The jump in partisanship in the House has also led to a shift of power away from House Committees, which were (and remain) natural gathering places for Members from all sides with particular policy concerns and expertise.

3. Tellingly, virtually no one who has served in Congress actually supports limitless, unchecked partisanship in the districting process. Even former Speaker of the House Newt Gingrich has candidly acknowledged that, with extreme partisan gerrymandering, each party "get[s] to rip off the public in the states where they control," but "the public gets ripped off in [all] circumstances."[44] According to Gingrich, "[i]n the long run, there's a downward spiral of isolation."[45] On that point, amici all agree: When partisan gerrymanders devalue general elections and the general electorate and encourage partisan grandstanding for the base over independent judgment and delivering results to constituents, we all lose.

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[43] Hayden, *Pearce talks*, *supra*.

[44] Eilperin, *The Gerrymander That Ate America*, Slate (Apr. 17, 2006).

[45] *Id.*

C. Extreme Partisan Gerrymandering Hurts The People Themselves

As explained above, two of the principal outgrowths of partisan gerrymandering are the lack of cooperation among Members even when there is common ground and voters' feeling of a foreordained, "rigged" outcome in non-competitive "safe" districts. These phenomena cause voters of all stripes to lose faith in the electoral process. The People get less in the way of results, and feel powerless to boot. As one distinguished commission, which included amica Senator Snowe and other former Members of Congress, has explained: "Th[e] overtly political [districting] process sows distrust among the electorate about the fairness of the districts as drawn and adds to the rancor between the political parties when one feels that the other is assigning lines that disadvantage their political opponents."[46]

Indeed, as more and more elections become uncompetitive—or are effectively reserved to those core partisans who tend to vote in party primaries—citizens increasingly view their votes as hollow gestures, which discourages turnout.[47] Voters understand when, as amicus Rep. Harris has explained, a districting map is

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[46] Bipartisan Policy Center, Commission on Political Reform, *Governing in a Polarized America* 30 (2014).

[47] Potter & Viray, *Barriers to Participation*, 36 U. Mich. J.L. Reform 547, 575 (2003) (electoral competition "plainly has a positive effect on the interest and participation of voters in the electoral process" but "[i]t stands to reason that voter turnout decreases when voters feel that their votes are inconsequential. This would occur most often when the outcome of an election appears so clearly predetermined as to make the election a formality.").

"not fair to citizens throughout the state."[48] Uncompetitive seats lead voters to feel left out of the conversation entirely.[49]

As a result, faith in the integrity of elections has dropped precipitously in recent years. The Gallup Poll found that between 2009 and 2016, the percentage of Americans who "have confidence" in the "honesty of elections" tumbled from 59 percent to 30 percent, while those lacking faith rose from 40 percent to 69 percent.[50] Partisan gerrymandering is a significant contributor to this loss of faith. A November 2013 poll found that 64 percent of respondents (including a majority of Republicans, Democrats, and Independents) believed that the redrawing of districts is often used to take power away from voters.[51]

In light of these trends, proposed electoral reforms, such as the introduction of independent or bipartisan

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[48] Zheng, *Reform seeks public input on redistricting in Md.*, WMDT (Nov. 1, 2016).

[49] *See generally* Issacharoff & Karlan, *Where to Draw*, 153 U. Pa. L. Rev. at 574 ("Noncompetitive elections threaten both the legitimacy and the vitality of democratic governance"); *see* Cox, *Partisan Gerrymandering*, 2004 Sup. Ct. Rev. at 433 n.66 (discussing how efforts to gerrymander may cause the public "to see the political process as somehow less legitimate and thereby skew the incentives to participate").

[50] *See* Gallup, *Update: Americans' Confidence in Voting, Election* (Nov. 1, 2016). This rapid shift can be attributed only in part to the highly partisan 2016 presidential election. As early as 2014, 59 percent of Americans said they lacked confidence in the honesty of elections, while only 40 percent held such confidence—a mirror image of the poll results from 2009. *Id.*

[51] *See* The Harris Poll, *Americans Across Party Lines Oppose Common Gerrymandering Practices* (Nov. 7, 2013).

redistricting commissions, have proven increasingly popular with voters across the political spectrum.[52] Voters are searching for some way to escape the dynamic of needless hyper-partisanship. Amici share that view, and embrace the States' role as laboratories for redistricting reform.[53]

But amici also know that enacting redistricting reform can be exceedingly difficult where one party controls the machinery of the districting process. In Illinois, voters have sought an amendment to the state constitution that would prevent any districts that are "drawn to purposefully or significantly discriminate against or favor any political party or group, and not considering the residence of any person."[54] But organs of state government controlled by the other party have

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[52] *See, e.g.*, MassINC, *New Poll Shows Public Strongly Favors Independent Commission on Redistricting* (Feb. 18, 2015), https://massinc.org/2015/02/18/new-poll-shows-public-strongly-favors-independent-commission-on-redistricting/ (February 2015 poll finding Massachusetts residents favor independent redistricting commission by 62 to 23 percent margin); Schott, *Most Utahns Want Redistricting Done by Independent Commission*, Utah Policy.com (July 29, 2015), http://utahpolicy.com/index.php/features/today-at-utah-policy/6480- (July 15 poll finding Utahans favor independent districting commission by 65 to 25 percent margin); *Citizens Don't Like Gerrrymandering; Study Offers Alternative Redistricting Methods*, UVA Today (June 30, 2014), https://news.virginia.edu/content/citizens-don-t-gerrymandering-study-offers-alternative-redistricting-methods (June 2014 poll finding Virginians favor independent redistricting commission by 74 to 15 percent margin).

[53] Indeed, many of amici's home States, such as California and Iowa, have been national leaders in removing gerrymandering from their redistricting processes.

[54] Duncan, *Group seeks to change redistricting*, The Southern Illinoisan (Mar. 23, 2014).

blocked this proposed reform. Even for amicus Representative Alan Lowenthal, who played a significant role in California's transition to an independent commission, the path to that result was long, difficult, and beset by partisan opposition from his own party.[55]

Entrenched majorities must be subject to basic limits on their ability to gerrymander for purely partisan gain. The health of the House, especially its ability to serve the People with clear-eyed independence, as intended, depends on it.

II. Extreme Gerrymandering Is Inconsistent With The Nature Of Representation In Our Form Of Government

Extreme partisan gerrymandering is not just a practical problem for the functioning of our government. It is inconsistent with the basic principles on which that government was founded.

The Framers gave the House of Representatives a special and critical role: to be the authentic voice of the People. They designed the House to be the body closest to the People, and closest to the ideal of a representative democracy. They intended Members of the House and the communities they serve to share strong bonds.

As Members and former Members of the House, amici strive to live up to the principles that animated the Framers' vision. Extreme gerrymanders are inconsistent with that vision

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[55] *See* Ingraham, *One easy way to end gerrymandering: Stop letting politicians draw their own districts*, Wash. Post (June 2, 2014).

A. Members Of The House Are Direct Representatives Of The People

The Framers conceived of a government in which institutions would reflect different forms of political authority. *See* Federalist No. 40 (Madison); *see also, e.g.*, Wood, *The Creation of the American Republic 1776-1787*, at 553-562 (1998). The President and the Senate, each indirectly elected to lengthy terms, were meant to reflect aspects of constitutional monarchy and aristocracy, respectively. *Id.*[56] But the House, then as now, was to be the bastion of democracy—"the grand depository of the democratic principle of the Gov[ernmen]t," as George Mason put it, 3 *The Records of the Federal Convention of 1787*, at 48 (Farrand ed. 1911) ("Farrand"), or the "popular branch," in Madison's words, Federalist No. 52.

The House's direct connection to the People was—and is—its essential quality. As Madison explained, the federal government would be a "paper confederacy" without it. Farrand, 472; *accord Wesberry* v. *Sanders*, 376 U.S. 1, 14 (1964) ("The House of Representatives ... was to represent the people as individuals, and on the basis of complete equality for each voter."). That direct connection is so vital because, in our constitutional order, "all political power flows from the people." *Arizona State Legislature* v. *Arizona Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2677 (2015) ("*AIRC*"); *see also, e.g.*, *U.S. Term Limits, Inc.* v. *Thornton*, 514 U.S. 779, 803, 821 (1995) (Framers created "a Federal Gov-

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[56] As originally drafted and ratified, the Constitution provided for Senators to be chosen by state legislatures rather than by the People. *See* U.S. Const. art. I, § 3, cl. 1. Direct election of Senators was not permitted until ratification of the 17th Amendment in 1913.

ernment directly responsible to the people"); *id.* at 839 (Kennedy, J., concurring) ("A distinctive character of the National Government, the mark of its legitimacy, is that it owes its existence to the act of the whole people who created it."); *McCulloch* v. *Maryland*, 17 U.S. 316, 404 (1819); *accord* U.S. Const., Preamble.

The Framers repeatedly emphasized their vision of a House of Representatives that was close to the People, directly responsive to them through the mechanism of frequent and broad-based elections, and thus capable of giving them a powerful voice in the Nation's decisionmaking. "'Who are to be the electors of the Federal Representatives?" Madison asked. "Not the rich more than the poor; not the learned more than the ignorant; not the haughty heirs of distinguished names, more than the humble sons of obscure and unpropitious fortune. The electors are to be the great body of the people of the United States." Federalist No. 57 (Madison); *see also* Letter from T. Pickering to C. Tillinghast, Dec. 24, 1787, in 1 *The Founders' Constitution* 252 (House members are the "immediate Representatives of the People"); 2 *Debates on the Federal Constitution* 28-29 (J. Elliot ed., 1876) ("*Elliot's Debates*") ("The federal representatives will represent the people; they will be the people.") (J.C. Jones).

The Framers built these principles directly into the structure of Article I. They provided for direct elections for the House "by the People of the several States" every two years, U.S. Const. art. I, § 2, cl. 1, and ensured that apportionment of House seats would be done "according to [the People's] respective numbers" in the States, *id.* cl. 3. And they provided that any person who could vote for "the most numerous Branch of the State Legislature" was eligible to vote in elections for the House as well. *Id.* cl. 1.

Frequent, broad-based elections create a "direct line of accountability between the National Legislature and the people who elect it," conceived as broadly as possible. *Cook* v. *Gralike*, 531 U.S. 510, 528 (2001) (Kennedy, J., concurring). In the Framers' thinking, it was "particularly essential that the [House] should have an immediate dependence on, and an intimate sympathy with, the people," and competitive elections were "unquestionably the only policy by which this dependence and sympathy can be effectually secured." Federalist No. 52 (Madison). Those in power, Madison explained, were to "be kept in dependence on the people" as a matter of "republican liberty." Federalist No. 37.

Notably, the People's representation in the House was to serve one of the fundamental goals of our constitutional structure: The elimination of excessive faction. *See* Federalist No. 10 (Madison).

One overarching imperative is thus clear from both the Framers' statements and the constitutional design they established: The role of the House in our constitutional order—to directly reflect the will of the People—depends on the electoral relationship between Members and the People. The Framers were deeply concerned with how the House would be elected precisely because the People's ability to choose their representatives was an essential guarantee of both popular sovereignty and liberty.

The Framers' concerns resonate across the centuries—and amici feel them every day as part of our lived experience. As Members of the House, amici are often the most accessible and familiar links between the people in the cities and towns of our particular corners of the country and their national government in Washington, DC.

B. Extreme Gerrymandering Distorts The People's Voice In Contravention Of The Framers' Vision

Extreme partisan gerrymandering threatens the Framers' vision of a directly accountable national legislature.

The Framers envisioned frequent, broad-based, competitive House elections that would create a relationship of "dependence" and tie House Members closely to the People. The entire point of extreme gerrymandering is to undercut that tie in order to achieve a narrow partisan political result. *See, e.g., Kirkpatrick* v. *Preisler*, 394 U.S. 526, 537-538 (1969) (Fortas, J., concurring) (describing "gerrymandering" as "the deliberate and arbitrary distortion of district boundaries and populations for partisan or personal political purposes").

In fact, the Framers themselves repeatedly expressed concern that, through the manipulation of electoral districts, "the House of Representatives should not really represent the people," thereby undermining the republican character of the nascent government. *E.g.*, 4 *Elliot's Debates* 303 (C. Pinckney); *accord* 3 *Elliot's Debates* 367 (Madison) (warning that improper "unequal" apportionment could "deprive[]" the people of "the right of suffrage"). They knew that, without some external check, the rules of the political process could be manipulated.[57] Their grave concern on this point makes sense in

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[57] *Compare* Greene, *Judging Partisan Gerrymanders Under the Elections Clause*, 114 Yale L.J. 1021, 1053-1054 (2005) ("[B]ecause gerrymanders involve the rigging of elections themselves, the regular political process is not entirely trustworthy in policing them") *with* Federalist Nos. 56 & 57 (Madison) (discussing rotten borough and pocket borough representatives in Parliament as overcome by faction due to structural defects, and asserting that broad elections by the whole People would remedy such defects).

light of their overall project, for "'the true principle of a republic is, that the people should choose whom they please to govern them.'" *Powell* v. *McCormack*, 395 U.S. 486, 540-541 (1969) (quoting 2 *Elliot's Debates* 257 (Hamilton)). Extreme partisan gerrymandering undermines that fundamental principle.

This Court has similarly described extreme gerrymandering as incompatible with our form of government. Extreme gerrymandering turns the "true principle" of our Republic on its head, permitting politicians to choose the people whom they shall govern rather than the reverse. *See AIRC*, 135 S. Ct. at 2677 (noting "the core principle of republican government ... that the voters should choose their representatives, not the other way around" (internal quotation marks omitted)) (quoting Berman, *Managing Gerrymandering*, 83 Tex. L. Rev. 781 (2005)). Partisan gerrymanders "[are incompatible] with democratic principles." *AIRC*, 135 S. Ct. at 2658 (quoting *Vieth* v. *Jubelirer*, 541 U.S. 267, 292 (2004) (plurality opinion) and citing *id.* at 316 (Kennedy, J., concurring in judgment)). They threaten the very notion of a representative government, in which, through the mechanism of broad-based popular elections, "legislatures ... should be bodies which are collectively responsive to the popular will." *Reynolds* v. *Sims*, 377 U.S. 533, 565-566 (1964) (explaining that "the basic aim of legislative apportionment" should be "achieving ... fair and effective representation for all citizens").

This is not to say that the districting process is always suspect, or that politics has no place in districting. Far from it. It is an inescapable fact that "the location and shape of districts" can determine "the political complexion of the area." *Gaffney* v. *Cummings*, 412 U.S. 735, 753 (1973). Some variation in the shape of districts is natural, so long as those variations "are based

on legitimate considerations incident to the effectuation of a rational state policy," such as keeping towns, counties, or cohesive political communities together. *E.g.*, *Reynolds*, 377 U.S. at 579. The political process can and often does produce districts based on legitimate considerations, and this, too, is as it should be.

But true representation, consistent with the special role of the House as the voice of the People, is diminished when district lines are designed to insulate Representatives from the People and the communities they serve and instead to achieve a preordained, partisan result. *Cf. California Democratic Party* v. *Jones*, 530 U.S. 567, 574 (2000) ("Representative democracy in any populous unit of governance is unimaginable without the ability of citizens to band together in promoting among the electorate candidates who espouse their political views."). The core principles of republican self-government, embodied in Article I, require the maintenance of a "direct link" between the People and their representatives in the House, *Thornton*, 514 U.S. at 803. Extreme partisan gerrymandering increasingly corrodes that link.

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Amici do not favor frequent or extensive judicial intervention in the political process; indeed, amici appreciate this Court's historical reluctance to enter the "political thicket" surrounding redistricting. *Colegrove* v. *Green*, 328 U.S. 549, 556 (1946) (plurality opinion); *see also Vieth*, 541 U.S. 267 (2004) (plurality opinion). But in light of the constitutional principles that animate our role as Members of the House, and the grave threat that hyper-partisanship poses to our Republic, we need constitutional ground rules that ensure basic standards

of fairness and broad-based competition, without subjecting the districting process to free-form judicial second-guessing.[58]

What our political system needs now—what the problem of extreme partisan gerrymandering needs now—are basic boundaries, so that our parties may begin to correct course and mend the broken parts of our political process. This Court should give the Nation that chance.

CONCLUSION

The judgment of the panel should be affirmed.

Respectfully submitted.

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[58] To that end, while all amici agree that some constitutional boundaries are essential to police the growing negative effects of partisan gerrymandering, amici take no position on the effectiveness of the different methods, such as the efficiency gap, that can be used for enforcing such boundaries.